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January 25, 2011

Mr. Charles Hoppin, Chair
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Delta Watermaster Report on the Reasonable Use Doctrine & Agricultural Water Use Efficiency

Dear Chairman Hoppin:

On behalf of the thirty member counties of the Regional Council of Rural Counties (RCRC) I submit for your consideration the following comments on Delta Watermaster Craig Wilson's report entitled *The Reasonable Use Doctrine & Agricultural Water Use Efficiency*.

RCRC staff noted with some surprise the topic of the Delta Watermaster's report when it first appeared on the agenda for the January 19, 2011 State Water Resources Control Board (State Water Board) meeting. RCRC is of the opinion that the Delta Watermaster in authoring this report has exceeded the authority conferred upon this newly created position by the California State Legislature.

SB 7x 1 (Chapter 5, Statutes of 2009) Section 85230 (a) identifies the Delta Watermaster as "...a special master for the Delta." Section 85230 (b) states that "*The Delta Watermaster's authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of the board's orders and license and permit terms and conditions that apply to conditions in the Delta.*"

RCRC notes that the Assembly Senate Third Reading analysis of SB 7x 1 states "*Creates the "Delta Watermaster" as enforcement officer for SWRCB in the Delta. Requires SWRCB to delegate certain enforcement – not adjudicatory – authorities; and, **Limits Delta Watermaster authority to in-Delta diversions and SWRCB orders and terms/conditions on water right permits that apply to conditions in the Delta.***" (emphasis added) Additionally, the Senate Rules Committee Senate Floor Analysis states in describing the position of the Delta Watermaster "*Creates Delta Watermaster as enforcement officer for SWRCB in the Delta.*"

Section 85230 (d) states "*The Delta Watermaster shall submit regular reports to the board and the council including, but not limited to, reports on water rights administration,*

water quality issues, and conveyance operations.” It is apparently this section of law that the Delta Watermaster is relying upon to expand his authority beyond the Delta due to the absence of the words “in the Delta” in the above referenced sentence. RCRC does not believe that the Delta Watermaster’s interpretation of Section 85230 (d) reflects legislative intent, and that the Section 85230 (a) – (d), read together, clearly limits the role and duties of the Delta Watermaster to the legal Delta.

As to the report itself, it contains numerous flaws. Key points, in brief, include:

- The Delta Watermaster states in the Introduction of the subject report that *“The underlying premise of this report is that the inefficient use of water is an unreasonable use of water.”* There is no legal support that RCRC is aware of for the concept that inefficiency equals unreasonable use for purposes of Article X Section 2. In fact, this concept is contrary to the conclusion reached by several courts that “reasonable use” does not require the most efficient use. One such case was the 1989 Big Bear Municipal Water District v. Bear Valley Mutual Water Company decision (207 Cal.App.3d 363, 377-378) in which the Court opined that *“...it is obvious that the most efficient use of water is not necessarily its most beneficial or reasonable use.”*
- It is in itself “unreasonable” to target only one specific beneficial use (agricultural water use) and exclude other beneficial uses.
- Practical differences that exist in different regions of the state are ignored in the subject report. The question of how much water is needed or applied for irrigation is complicated and varies depending on a variety of factors (soil, type of crops, climatic conditions, etc). Various courts have considered this issue over time and have determined that reasonable use should be determined on a case-by-case basis. The same applies to the method of diversion. In agriculture utilization of what is considered the most “efficient” method of use could in fact negatively impact downstream water right holders and instream uses.
- Due process requirements are proposed to be eliminated under the guise of “streamlining”. RCRC strongly opposes the recommendation of the Delta Watermaster that the State Water Board change its procedures to allow for the issuance of a Cease and Desist Order (CDO) for alleged violations prior to an investigation, notice and hearing.
- Efforts are currently underway by the Department of Water Resources and local water agencies as required by SB 7x 7 (Water Code Sections 10608.48 and 10608.64) to “...develop a methodology for quantifying the efficiency of agricultural water use”. It is through this process, utilizing the Agricultural Water Management Council, academic experts, and other knowledgeable stakeholders that the Legislature chose to address the issue of agricultural water use efficiency. The Delta Watermasters’ report and recommendations are not only beyond the scope of his authority but also duplicative of ongoing efforts.
- The subject report states in the Introduction that *“...small changes in agricultural water use efficiency can produce significant amounts of “wet” water...”* and that *“More efficient use of water upstream of the Delta can increase flows into the Delta.”* RCRC notes that additional agricultural water use efficiency cannot be depended upon to result in water for other uses. Farmers are just as likely to

utilize voluntarily conserved water to grow additional crops as they are to transfer water for other uses. The same applies to the State Water Project (SWP) and the Central Valley Project (CVP). Water conserved by SWP and CVP water contractors will be used to increase water deliveries or be stored for future use. Note: Water Code Section 1011 protects water rights for conserved water stating in part “...any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use.”

- Creation of a new unit focused on unreasonable use would divert resources intended to focus on illegal diversions in the Delta. The 25 PYs authorized by the SB 7x 8 are funded by fee revenue in the Water Rights Fund. Redirection of these funds would more than likely result in litigation.

In conclusion, RCRC appreciates the opportunity to provide comments to the Delta Stewardship Council on the scope of authority of the Delta Watermaster and *The Reasonable Use Doctrine and Agricultural Water Use Efficiency* report. Please feel free to contact me at (916) 447-4806 or kmannion@rcrcnet.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathy Mannion".

Kathy Mannion
Legislative Advocate

cc: Delta Watermaster Craig Wilson
Members, State Water Resources Control Board
Chair and Members, Delta Stewardship Council